Robert A. Sacks (SBN 150146)
sacksr@sullcrom.com
Rory P. Culver (SBN 271868)
culverr@sullcrom.com
SULLIVAN & CROMWELL LLP
1888 Century Park East, Suite 2100
Los Angeles, California 90067
Tel: (310) 712-6600
Fax: (310) 712-8800

Laura Kabler Oswell (SBN 241281)
oswelll@sullcrom.com
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Tel.: (650) 461-5600
Fax: (650) 461-5700

Attorneys for Specially Appearing Defendant Thomson S.A.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION

This Document Relates to:

Sharp Electronics Corp., et al. v. Hitachi, Ltd., et al., No. 13-cv-01173.

Master File No. 3:07-5944-SC

MDL No. 1917

THOMSON S.A.'S NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Date: October 14, 2013
Time: 9:00 a.m.
Place: JAMS Resolution Center,
Two Embarcadero Center, Suite 1500
Judge: Hon. Samuel Conti
Special Master: Hon. Charles A. Legge (Ret.)

[DECLARATION OF ADRIEN CADIEUX AND [PROPOSED] REPORT AND RECOMMENDATION GRANTING MOTION TO DISMISS FILED CONCURRENTLY HEREWITH]

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 14, 2013 at 9:00 a.m. or as soon thereafter as this matter may be heard, before the Honorable Charles A. Legge (Ret.) at the office of JAMS, Two Embarcadero Center, Suite 1500, San Francisco, California, specially appearing defendant Thomson S.A. will and hereby does move this Court for an order dismissing the claims asserted against Thomson S.A. in the above-titled action pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction.

In support of this Motion, Thomson S.A. relies upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, the Declaration of Adrien Cadieux sworn on June 28, 2013 in support thereof, and such other materials and information that the Court may properly consider at or before the hearing on this motion.

Dated: July 3, 2013

/s/ Robert A. Sacks

Robert A. Sacks (SBN 150146)
Rory P. Culver (SBN 271868)
SULLIVAN & CROMWELL LLP
1888 Century Park East, Suite 2100
Los Angeles, California 90067
Tel.: (310) 712-6600
Fax: (310) 712-8800

Laura Kabler Oswell (SBN 241281)
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Tel.: (650) 461-5600
Fax: (650) 461-5700

Attorneys for Specially Appearing Defendant Thomson S.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, Thomson S.A. (n/k/a Technicolor S.A.) specially appears in this matter solely for the purpose of objecting to this Court's jurisdiction, and respectfully submits this Memorandum in support of its motion to dismiss ("Motion") the claims asserted against Thomson S.A. by Sharp Electronics Corporation and Sharp Electronics Manufacturing Company of America, Inc. (collectively, "Sharp").[1]

ISSUE TO BE DECIDED

Whether the claims against Thomson S.A. set forth in Sharp's Complaint filed on March 15, 2013 (the "Complaint" or "Compl.") should be dismissed pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure on the ground that the Court lacks personal jurisdiction over Thomson S.A. in this case because Thomson S.A. is incorporated and headquartered outside of the United States, lacks the requisite "minimum contacts" with the United States, including California, New York, New Jersey, and Tennessee, and has never manufactured or sold any products relevant to this litigation in the United States.

PRELIMINARY STATEMENT

Sharp asks this Court to exercise personal jurisdiction over Thomson S.A., a French holding company with its principal place of business in Issy-les-Moulineaux, France that has never done business in the United States, does not maintain any offices in the United States, has never manufactured or distributed cathode ray tubes ("CRTs") or products containing CRTs ("CRT Products") (Compl. ¶¶ 1, 3) in the United States or elsewhere, and, as alleged in the Complaint, has not owned any entities that manufacture or distribute CRTs or CRT Products since 2005. Notwithstanding Thomson S.A.'s absolute irrelevance to this years-old class action,

[1] In the event that this Court denies the Motion, Thomson S.A. will move to dismiss the Complaint for failure to state a claim pursuant to Rule 12(b)(6) and will join in Thomson Consumer Electronics, Inc.'s Motion to Dismiss (MDL Dkt. No. 1677). *See Schnabel* v. *Lui*, 302 F.3d 1023, 1034 (9th Cir. 2002) (holding only waivable defenses, such as lack of personal jurisdiction and insufficiency of process, must be raised in initial motion to dismiss); *see also Rivercard, LLC* v. *Post Oak Prods., Inc.*, No. 12-cv-01150, 2013 WL 1908315, at *3 n.2 (D. Nev. May 6, 2013) (allowing motion to dismiss for failure to state a claim after motion to dismiss for lack of personal jurisdiction); *Sprint Telephony PCS, L.P.* v. *Cnty. of San Diego*, 311 F. Supp. 2d 898, 905 (S.D. Cal. 2004) (allowing successive motions to dismiss for failure to state a claim).

Sharp filed claims against it under Section 1 of the Sherman Act, 15 U.S.C. § 1, and under the laws of California, New York, New Jersey and Tennessee, based on an alleged price-fixing conspiracy among CRT suppliers. (Compl. ¶ 1.) In doing so, Sharp asks this Court to ignore the fundamental constitutional requirement that the exercise of personal jurisdiction over Thomson S.A. must comport with the Due Process Clause. Because Sharp fails to offer any facts to establish this Court's jurisdiction over Thomson S.A.—despite being on notice since at least October 15, 2008 that Thomson S.A. would object to the jurisdiction of this Court (MDL Dkt. No. 397)—its claims against Thomson S.A. should be dismissed with prejudice.

This Court does not have general or specific jurisdiction over Thomson S.A. *First*, this Court cannot exercise general jurisdiction over Thomson S.A. Although Sharp alleges generically that "[e]ach Defendant conducts substantial business in" or "maintain[s] their headquarters in" the United States (Compl. ¶ 19), the attached declaration of Adrien Cadieux (the "Cadieux Declaration" or "Cadieux Decl.") demonstrates that Thomson S.A. lacks any contacts with this forum, let alone the continuous and systematic contacts on which general jurisdiction must be based. *Second*, this Court cannot exercise specific jurisdiction over Thomson S.A. because Thomson S.A. has not purposefully directed its activities at this forum, Sharp's claims do not arise out of Thomson S.A.'s contacts with this forum, and the exercise of specific jurisdiction in this case would be unreasonable. *Third*, this Court cannot exercise personal jurisdiction over Thomson S.A. on the basis of the contacts of its U.S. subsidiary Thomson Consumer Electronics, Inc. (n/k/a Technicolor U.S.A. Inc.) ("Thomson Consumer"), because the Complaint does not establish the existence of an "alter-ego" or "agency" relationship between those two entities, which are both formally and factually independent from one another. Indeed, the only other district court in the United States to consider this issue has concluded that there is no basis for imputing the contacts of Thomson Consumer to Thomson S.A.

SHARP'S ALLEGATIONS

In the 64 pages and 287 paragraphs that comprise the Complaint, the only allegations regarding Thomson S.A.'s contacts with this forum are that Thomson S.A.: (1) "*through its wholly owned subsidiary [Thomson Consumer]*, was a major manufacturer of CRTs

for the United States market, with plants located in the United States, Mexico, China and Europe" (Compl. ¶ 72 (emphasis added)); (2) "sold its CRTs internally to its television-manufacturing division, which had plants in the United States and Mexico, and to other television manufacturers in the United States and elsewhere" (*id.*); (3) "manufactured, marketed, sold and/or distributed CRT Products either directly or *through its subsidiaries or affiliates* throughout the United States" (*id*. (emphasis added)); and (4) "dominated and/or controlled the finances, policies, and/or affairs of [Thomson Consumer] relating to the antitrust violations alleged in [the] Complaint"[2] (*id*. ¶ 73).

The remainder of the allegations on which Sharp must base its claim for personal jurisdiction are generic and are alleged indiscriminately against 39 different defendants, including that the defendants "[conduct] substantial business in the state of California, . . . maintain their headquarters in this District or elsewhere in California[,] . . . purposefully availed themselves of the laws of the United States and California insofar as they manufactured, marketed, or distributed CRT Products in the United States and California, and . . . have admitted that they engaged in conduct in furtherance of the conspiracy in the Northern District of California." (*Id*. ¶ 19.) But these blanket allegations are not true as against Thomson S.A., who has not admitted any conduct in furtherance of the alleged conspiracy, and are contradicted by other allegations in the Complaint. (*See, e.g.*, *id.* ¶ 72 (alleging that Thomson S.A. is a French corporation with a principal place of business in France).) They are also directly contradicted by the Cadieux Declaration, which confirms that Thomson S.A.'s headquarters are located in France and which demonstrates that Thomson S.A. has never manufactured, marketed, sold or distributed CRTs or CRT Products in the United States or elsewhere. (Cadieux Decl. ¶¶ 4, 14-15.)

[2] Sharp has advanced this boilerplate allegation *thirty-eight times* as to various defendants and co-conspirators. (*See* Compl. ¶¶ 33-37, 40-41, 43, 49-54, 57-63, 66-70, 73, 76-77, 85-88, 91, 94-95, 100-01.)

ARGUMENT

I. SHARP'S CLAIMS AGAINST THOMSON S.A. SHOULD BE DISMISSED BECAUSE THIS COURT LACKS PERSONAL JURISDICTION OVER THOMSON S.A.

Sharp "has the burden of establishing that jurisdiction exists." *Flynt Distrib. Co., Inc.* v. *Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984); *Harris Rutsky & Co. Ins. Servs., Inc.* v. *Bell & Clements Ltd.*, 328 F.3d 1122, 1128-29 (9th Cir. 2003). The Complaint should be dismissed if Sharp fails to make a prima facie showing of personal jurisdiction. *See Fields* v. *Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). And, Sharp's allegations need not be taken as true if they are contradicted by a sworn declaration. *See Mavrix Photo, Inc.* v. *Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1101 (2012).

The Court can exercise personal jurisdiction over a non-resident defendant only where doing so is consistent with the Due Process Clause, which requires that the defendant have such minimum contacts with the forum that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)). In order to satisfy the Due Process Clause, Sharp must demonstrate that either (a) Thomson S.A. has such substantial contacts with the United States that it is effectively "physical[ly] presen[t]" and therefore subject to general jurisdiction here, or (b) Thomson S.A. has a sufficient connection to the alleged misconduct through acts *in* or *purposefully directed at* the forum to establish specific jurisdiction for the purposes of this litigation. *See Bancroft & Masters, Inc.* v. *Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).[3] Sharp has not met its burden.

A. This Court Lacks General Jurisdiction Over Thomson S.A.

General jurisdiction only exists over a foreign corporation when its "affiliations with the [forum] are so 'continuous and systematic' as to render [it] essentially at home in the forum . . . ." *Goodyear Dunlop Tires Opers., S.A.* v. *Brown*, 131 S. Ct. 2846, 2851 (2011) (citing

[3] Under Section 12 of the Clayton Act, 15 U.S.C. § 22, "the relevant forum . . . is the United States." *Action Embroidery Corp.* v. *Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004) (explaining that national contacts analysis applies when the relevant statute provides for nationwide service of process).

Int'l Shoe, 326 U.S. at 317). "This is an exacting standard," *Schwarzenegger* v. *Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004), that requires the plaintiff to show that the defendant's contacts "constitute the kind of continuous and systematic general business contacts that approximate physical presence." *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1124 (9th Cir. 2002) (quotation omitted). Sharp can therefore only establish general jurisdiction as to Thomson S.A. through "a showing of substantial operations in the [United States], marked by longevity, continuity, volume, economic impact, physical presence, and integration into the [nation's] markets." *N. Am. Lubricants Co.* v. *Terry*, No. 11-1284, 2012 WL 1108918, at *5 (E.D. Cal. Apr. 2, 2012) (citing *Mavrix Photo*, 647 F.3d at 1224 and *Data Disc, Inc.* v. *Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977)). The Ninth Circuit has "regularly . . . declined to find general jurisdiction even where the contacts [have been] quite extensive." *Amoco Egypt Oil Co.* v. *Leonis Nav. Co.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993); s*ee also Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 115-16 (1987).

Sharp cannot satisfy this "exacting standard" and does not allege the "extensive" contacts in the forum that could provide a basis for general jurisdiction. *Schwarzenegger*, 374 F.3d at 801. Sharp has not alleged any meaningful conduct or involvement on the part of Thomson S.A. in the United States, let alone conduct that could rise to the level of "continuous and systematic . . . contacts."[4] *Glencore*, 284 F.3d at 1124. And, as described in the Cadieux Declaration, no such facts exist. As Sharp alleges, Thomson S.A. is a French entity located in France. (Compl. ¶ 72; *see also* Cadieux Decl. ¶ 4.) It has no operations and no employees anywhere in the United States. (Cadieux Decl. ¶¶ 6-7.) It maintains no offices in the United

[4] Nor can Sharp establish jurisdiction simply by alleging that Thomson S.A. placed CRT Products in the stream of commerce (*see* Compl. ¶ 70). *See J. McIntyre Mach., Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2785 (2011) (rejecting the notion that "the so-called stream-of-commerce doctrine" can "displace" "the general rule" that a party must "purposefully avail[] itself of the privilege of conducting activities within the forum" (quotation omitted)); *see also Purdue Research Found.* v. *Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 788-89 & n.19 (7th Cir. 2003) (holding that the stream of commerce theory "provides no basis for exercising general jurisdiction over a nonresident defendant") (collecting cases); *see also Fischer* v. *Prof'l Compounding Ctrs. of Am., Inc.*, 318 F. Supp. 2d 1046, 1050 (D. Nev. 2004); *aff'd Fischer* v. *Alfa Chems. Italiana*, No. 05-17402, 2007 WL 4292250 (9th Cir. Dec. 7, 2007) ("the stream of commerce theory does not apply to a general jurisdiction analysis").

States, owns no real property in the United States and is not registered to do business in the United States. (Cadieux Decl. ¶¶ 7, 8, 13.) The company has no bank accounts in the United States and does not pay taxes in the United States. (Cadieux Decl. ¶¶ 10-11.) Nor has Thomson S.A. designated a registered agent for service of process in the United States. (Cadieux Decl. ¶ 12.) Sharp has not and cannot allege that Thomson S.A. has the constitutionally required "continuous and systematic" contacts with the United States to support the exercise of general jurisdiction. *See Glencore*, 284 F.3d at 1124 (finding no general jurisdiction where there was no evidence that the defendant owned property, held bank accounts, had employees, solicited business or had designated an agent in the forum); *see also Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) (holding that lack of offices, agent, business registration, and payment of taxes "militate against the exercise of general jurisdiction").

B. This Court Lacks Specific Jurisdiction Over Thomson S.A.

Sharp also fails to allege facts sufficient to support this Court's exercise of specific jurisdiction over Thomson S.A. Specific jurisdiction exists when "the cause of action arises out of or has a substantial connection to the defendant's contacts with the forum." *Glencore*, 284 F.3d at 1123 (citing *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958)). The Ninth Circuit applies a three-part test to determine whether a defendant's activities are sufficiently related to the forum to meet the requirements of constitutional due process: "(1) [t]he non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable." *Schwarzenegger*, 374 F.3d at 802 (citing *Lake* v. *Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). "If *any of the three* requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law." *Omeluk* v. *Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995) (emphasis added).

1. Thomson S.A. Did Not Purposefully Direct Activities to This Forum.

Courts apply the purposeful direction (rather than the purposeful availment) test in anti-trust cases.[5] *Fleury* v. *Cartier Int'l*, No. C-05-4525, 2006 WL 2934089, at *2 (N.D. Cal. Oct. 13, 2006). Purposeful direction is in turn evaluated under the three-part "effects test" derived from *Calder* v. *Jones*, 465 U.S. 783 (1984), which requires that Sharp establish that Thomson S.A. "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that [Thomson S.A. knew was] likely to be suffered in the forum state." *See Schwarzenegger*, 374 F.3d at 803 (quoting *Dole Food Co., Inc.* v. *Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)). The Ninth Circuit has warned that "the foreign-acts-with-forum-effects jurisdictional principle 'must be applied with caution, particularly in an international context.'" *Kramer Motors, Inc.* v. *British Leyland, Ltd.*, 628 F.2d 1175, 1178 (9th Cir. 1980) (quoting *Leasco Data Processing Equip. Corp*. v. *Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972)). In this case, Sharp has clearly failed to satisfy the "effects test."

First, Sharp fails to allege that Thomson S.A. carried out any intentional act aimed at plaintiffs resident in the United States. Instead, Sharp has intentionally obscured the distinction between Thomson S.A. and Thomson Consumer (Compl. ¶ 74 (defining both Thomson S.A. and Thomson Consumer as a single entity "Thomson") and has alleged that this generic "Thomson" entity participated in unspecified meetings (*id*. ¶ 187)[6]—none of which are alleged to have occurred in the United States. (*See id*. ¶¶ 7, 138, 140, 148, 150, 167.) However, allegations regarding a generic "Thomson" entity are insufficient as a matter of law to state a

[5] Sharp would not be able to satisfy the purposeful availment standard either. Sharp has alleged that this Court has jurisdiction over the defendants because they "[conduct] substantial business in the state of California, . . . maintain their headquarters in this District or elsewhere in California[,] . . . purposefully availed themselves of the laws of the United States and California insofar as they manufactured, marketed, or distributed CRT Products in the United States and California, and . . . have admitted that they engaged in conduct in furtherance of the conspiracy in the Northern District of California." (Compl. ¶ 19.) However, as discussed above, none of these conditions applies to Thomson, S.A. and there is thus no basis on which Sharp could argue that Thomson S.A. "purposefully availed" itself of the laws of the United States.

[6] These overly vague allegations can be contrasted with Sharp's more robust allegations regarding the participation of other defendants in the alleged meetings. (Compl. ¶¶ 140, 142, 149-50, 169, 170).

claim against Thomson S.A. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008) (holding "general allegations as to all defendants, to 'Japanese defendants,' or to a single corporate entity such as 'Hitachi'" were insufficient to state a claim); *see also In re Cal. Title Ins. Antitrust Litig.*, No. C 08-01341, 2009 WL 1458025, at *8 (N.D. Cal. May 21, 2009) (holding "general allegations as to the families of . . . companies, without any specific allegations as to what the [defendant] did," were insufficient to state a claim). Sharp has not alleged that Thomson S.A. played any role whatsoever in the alleged conduct. As a matter of due process, this Court should not exercise personal jurisdiction over a foreign defendant on the basis of the tenuous and vague allegations that Sharp has offered.[7]

Second, Sharp does not allege that Thomson S.A. expressly aimed any alleged intentional acts at the United States. It is not enough that the effects of the defendant's alleged foreign conduct were foreseeable; rather, the "effects test" requires that the intentional act be expressly aimed at the forum. *Bancroft & Masters*, 223 F.3d at 1087; *see also N. Am. Lubricants Co.*, 2012 WL 1108918 at *7 ("Acts with merely foreseeable effects in the forum state do not satisfy this portion of the effects test." (citing *Pebble Beach Co.* v. *Caddy*, 453 F.3d 1151, 1158 (9th Cir. 2006))). "Express aiming" requires that the defendant have "engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. C 02-1486, 2005 WL 2988715, at * 6 (N.D. Cal. Nov. 7, 2005). Sharp cannot show that Thomson S.A. expressly aimed any conduct at the United States because Thomson S.A. has never manufactured or sold CRTs or CRT Products in the United States and does not conduct any business in the United States. *See id.* (holding that plaintiffs could not establish express aiming where defendant had never manufactured or sold any DRAM in the forum states or maintained business or corporate formalities in the forum states).

[7] Sharp's vague allegation that "[t]he activities of Defendants . . . were intended to, and did have a direct, substantial, and reasonably foreseeable effect on United States domestic and import trade or commerce" (Compl. ¶ 18; *see also* Compl. ¶¶ 12, 105) cannot save Sharp's failure to establish purposeful direction by Thomson S.A., because such "unsubstantiated and vague statement[s] do[] not establish a prima facie case for jurisdiction." *Holland Am. Line, Inc.* v. *Wärtsilä N. Am., Inc.*, 485 F.3d 450, 458 (9th Cir. 2007).

Finally, Sharp does not allege that Thomson S.A.'s actions caused harm that Thomson S.A. knew was "likely to be suffered in the forum state." *Schwarzenegger*, 374 F.3d at 803. Thomson S.A. did not manufacture, market, sell, or distribute CRTs or CRT Products in the United States and did not set prices for CRTs or CRT Products sold in the United States. (Cadieux Decl. ¶¶ 14-15, 21.) Accordingly, no alleged wrongful acts by Thomson S.A.—and the Complaint alleges no acts specific to Thomson S.A.—could have had a direct impact on Sharp. Nor can Sharp satisfy this third prong on the ground that Thomson S.A. indirectly caused harm through the actions of its subsidiary, Thomson Consumer. *See Nw. Aluminum Co. et al.* v. *Hydro Aluminum Deutschland GmbH*, No. Civ. 02-398, 2003 WL 23571744, at *5 (D. Or. Sept. 23, 2003) (holding that the effects test is not satisfied with respect to the parent corporation based upon harm which could only have been caused as a result of prices set by forum-based subsidiary).

2. Sharp's Claims Do Not Arise Out of Thomson S.A.'s Forum-Related Activities.

To demonstrate that Sharp's claims arise out of Thomson S.A.'s forum-related activities, Sharp must establish that its claims would not have arisen but for Thomson S.A.'s contacts with this forum. *See Wine Bottle Recycling, LLC* v. *Niagara Sys. LLC*, No. 12-1924, 2013 WL 1120962, at *7 (N.D. Cal. Mar. 18, 2013) (declining exercise of specific jurisdiction where plaintiff did not allege facts sufficient to show that claim would not have arisen in the absence of defendant's alleged involvement.) In the first place, Sharp has not pleaded any conduct by Thomson S.A. in the forum, and its conclusory allegations regarding Thomson S.A.'s alleged activities, and vague allegations regarding an unspecified "Thomson" entity are not sufficient. (*See, e.g.*, Compl. ¶ 187.) Furthermore, Sharp's allegation that Thomson S.A., "through" Thomson Consumer, "was a major manufacturer of CRTs for the United States market" (*id.* ¶ 72) – in addition to being incorrect (Cadieux Decl. ¶ 14) – is insufficient as a matter of law because Thomson Consumer's activities are not attributable to Thomson S.A. *See infra* at 12 -17; *Barantsevich* v. *VTB Bank*, No. CV 12-08993, 2013 WL 3188178, at *5 (C.D. Cal. May 29, 2013); *Doe* v. *Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001) (emphasis added)).

Thomson S.A. simply lacks any forum-related activities out of which Sharp's claim *could* arise. (*See* Cadieux Decl. ¶¶ 6-16.) Likewise, as discussed above, *supra* at 3, none of Sharp's generic allegations regarding unspecified defendants' contacts to the United States apply to Thomson S.A. (*See* Compl. ¶ 19.) Accordingly, because Thomson S.A. conducts no business in and has no contacts with the United States, Sharp cannot plead any forum-related conduct by Thomson S.A., let alone forum-related conduct that is the "but for" cause of Sharp's claims here. *See Glencore*, 284 F.3d at 1123 (holding that plaintiff's claim could not arise out of conduct directed at or related to forum where contract involved foreign parties and was negotiated and required performance abroad); *In re DRAM Antitrust Litig.*, 2005 WL 2988715 at *9 (holding that a claim cannot arise out of non-existent contacts); *McGlinchy* v. *Shell Chem. Co.*, 845 F.2d 802, 817 (9th Cir. 1988) (holding that "the complete absence of activity by [defendant] in [forum] bars personal jurisdiction").

3. The Exercise of Jurisdiction in This Case Would be Unreasonable.

Even if Sharp had established a sufficient nexus between the alleged activities of Thomson S.A. and this forum—which it has not—the exercise of personal jurisdiction in this case would be unreasonable. Courts consider seven factors to evaluate reasonableness under the third prong of the *Schwarzenegger* test:

> "(1) the extent of the defendant's purposeful interjection into the forum state,[8] (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant's state, (4) the forum state's interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum to the plaintiff's interest in convenient and effective relief, and (7) the existence of an alternative forum."

Bancroft & Masters, 223 F.3d at 1088 (citing *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 476-77 (1985)).

The burden imposed on Thomson S.A. is the most important factor. *Terracom* v. *Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995) ("[T]he law of personal jurisdiction is

[8] As discussed above, *supra* at 4-10, and described in the Cadieux Declaration, Thomson S.A. has not purposefully interjected itself into this forum.

asymmetrical and is primarily concerned with the defendant's burden."); *see also Menken* v. *Emm*, 503 F.3d 1050, 1061 (9th Cir. 2007) ("[I]n this circuit, the plaintiff's convenience is not of paramount importance.") (citation omitted). The burden on Thomson S.A. in litigating this complex case would be significant. To the extent evidence still exists concerning the CRT business that Thomson S.A. sold eight years ago, any documents are located in France; the same is true for any personnel who might have knowledge concerning the CRT business. Not only would obtaining relevant information located in France be costly and burdensome, it would also potentially subject Thomson S.A. to criminal sanctions under the French "blocking statute,"[9] which prohibits the communication or disclosure of documents or information of an economic, commercial, industrial, financial or technical nature for use as evidence in foreign judicial proceedings. *See In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 356 (D. Conn. 1991) (discussing effect of "blocking statute" and requiring plaintiffs to comply with procedures under the Hague Convention in pursuing any discovery from defendant).[10]

Exercising personal jurisdiction over Thomson S.A. would also be inefficient and would not further Sharp's interest in convenient and effective relief. Thomson S.A. did not manufacture or sell CRTs or CRT Products in the United States or elsewhere. (*See* Cadieux Decl. ¶¶ 14-15.) Thomson Consumer – also named as a defendant in the Sharp action – is the entity in the Thomson group of companies that manufactured and/or sold CRTs in the United

---

[9] Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères [Law 80-538 of July 16, 1980 relating to the disclosure of documents and information of an economic, commercial or technical nature to foreign natural and legal persons], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1980, p. 1799 (Imposing criminal sanctions including imprisonment and a fine on parties who export certain categories of documents or respond to discovery requests).

[10] For the same reason, the exercise of personal jurisdiction over Thomson S.A. would therefore raise substantial concerns regarding French sovereignty. *See e.g., Sinatra* v. *Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1199-1200 (9th Cir. 1988); *see also Asahi*, 480 U.S. at 115 (recommending a "careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State"); *Glencore*, 284 F.3d at 1125 (holding that burden on foreign defendant with no minimum contacts and having witnesses and evidence abroad would be great and that where "the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction" (citation omitted)).

States, and it has not contested this Court's jurisdiction (although it has moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)). *See In re DRAM Antitrust Litig.*, 2005 WL 2988715 at *9 (finding that the exercise of jurisdiction over foreign corporations lacking minimum contacts with forum would be unreasonable given hardship to defendants and continuation of underlying suit against other defendants). There is simply no good reason to exercise personal jurisdiction over Thomson S.A. in this matter.

C. This Court Does Not Have Jurisdiction Over Thomson S.A. by Virtue of Thomson Consumer's Activities in This Forum.

Having failed to allege facts sufficient to show general or specific jurisdiction over Thomson S.A. directly, Sharp appears to propose that this Court should exercise jurisdiction over Thomson S.A. by virtue of Thomson Consumer's activities in this forum. In support of this contention, Sharp conclusorily alleges that Thomson S.A. "dominated and/or controlled the finances, policies, and/or affairs of [Thomson Consumer] relating to the antitrust violations alleged in this Complaint" (Compl. ¶ 73),[11] and that "[e]ach Defendant that is a subsidiary of a foreign parent acts as the United States agent for CRT Products made by its parent company." (*Id.* ¶ 80.) However, "[w]ithout more, neither ownership [nor] control of a subsidiary corporation by a foreign parent corporation . . . subjects the parent to the jurisdiction of the state where the subsidiary does business." *Beene* v. *Beene*, No. C 11-6717, 2012 WL 3583021, at *4 (N.D. Cal. Aug. 20, 2012) (quotation omitted); *see also Bauman* v. *DaimlerChrysler Corp.*, 644 F.3d 909, 920-21 (9th Cir. 2011), *cert. granted*, 133 S. Ct. 1995 (April 22, 2013) (No. 110965) (Only under specific circumstances will court find contacts to support exercise of personal jurisdiction over parent company by virtue of its relationship to subsidiary).

There is a "general presumption in favor of respecting the corporate entity." *Calvert* v. *Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1995). Consequently, only on "rare occasion[s]" will a Court treat a parent and its subsidiary as a single entity for jurisdictional purposes. *Id.* Sharp can rebut this presumption only by demonstrating that a subsidiary is either

[11] This is a boilerplate and entirely unsubstantiated allegation. *See supra*, note 2.

(a) the alter-ego or (b) the agent of the parent corporation. *See Unocal*, 248 F.3d at 925-26; *Harris Rutsky*, 328 F.3d at 1134. This precise argument as applied to Thomson S.A. and Thomson Consumer has already been considered and rejected by another district court. *See Audio MPEG, Inc.* v. *Thomson S.A.*, No. Civ. 05-0565, slip op. at 5-6 (E.D. Va. Oct. 17, 2005) ("[T]here is insufficient evidence that Thomson Inc. [f/k/a Thomson Consumer] is an agent or alter ego of Thomson S.A. . . . Thomson S.A. and [Thomson Consumer] are separate corporations in form and fact. They have separate corporate offices, officers, and bank accounts. [Thomson Consumer] is independently responsible for selling, marketing, and distributing its products." (citation omitted)). Sharp has similarly failed to allege facts sufficient to show the existence of either an alter-ego or agency relationship between Thomson S.A. and Thomson Consumer and can offer no reason for this Court to reach a different conclusion than the Eastern District of Virginia.

1. Thomson Consumer is Not the Alter Ego of Thomson S.A.

To establish that Thomson Consumer is the alter-ego of Thomson S.A., Sharp must demonstrate "(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice." *Unocal*, 248 F.3d at 926 (quoting *AT&T Co.* v. *Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996).

The first prong of this test requires that Sharp allege facts sufficient to show that Thomson S.A. controls Thomson Consumer "'to such a degree as to render the latter the mere instrumentality of the former.'" *Unocal*, 248 F.3d at 926 (quoting *Calvert*, 875 F. Supp. at 678). This requires a level of control above and beyond that which is normally incidental to the parent's ownership of a subsidiary, such that "the parent dictates every facet of the subsidiary's business—from broad policy decisions to routine matters of day-to-day operation." *Id.* (quotation omitted.) Sharp certainly cannot establish this level of control through the boilerplate allegation that "Thomson SA [sic] dominated and/or controlled the finances, policies, and/or affairs of [Thomson Consumer] relating to the antitrust violations alleged in [the] Complaint" (Comp. ¶ 73), which it has indiscriminately repeated with respect to nearly every set of parent

and subsidiary defendants that it has named. *See supra* note 2. Beyond this vague allegation, Sharp has not alleged a single specific fact that could support a finding that there exists the requisite "unity of ownership" between the two Thomson entities.

Nor can Sharp allege facts sufficient to show the day-to-day control that characterizes an alter-ego relationship. The Cadieux Declaration describes the relationship between Thomson S.A. and Thomson Consumer, which typifies the parent-subsidiary relationships that courts have repeatedly found to be insufficient to establish an alter-ego relationship. *See Unocal*, 248 F.3d at 926 (holding that "[a]ppropriate parental involvement" such as "monitoring of the subsidiary's performance, supervision of [its] finance and capital budget decisions, and articulation of general policies and procedures" is insufficient to support a finding of personal jurisdiction on the basis of the subsidiary's contacts. (quotation omitted)); *see also United States* v. *Bestfoods*, 524 U.S. 51, 72 (1998) (holding that a parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is "consistent with the parent's investor status" (quotation omitted)). Thomson S.A. and Thomson Consumer operate as separate corporate entities and observe all corporate formalities necessary to maintain this separateness. (Cadieux Decl. ¶¶ 18-20.) The two entities have separate management, separate finances, and separate corporate offices. (*Id.*) Courts decline to find an alter-ego relationship even in cases with much more involvement between a parent and subsidiary than exists here. *See, e.g., Kramer Motors*, 628 F.2d at 1177 (finding no alter-ego relationship even though the parent reviewed and approved the subsidiary's major decisions and was closely involved in the subsidiary's pricing decisions); *see also Fletcher* v. *Atex, Inc.* 68 F.3d 1451, 1459-60 (2d Cir. 1995) (finding no alter-ego relationship where parent's approval was required for subsidiary's leases, major capital expenditures, and sale of assets).[12]

[12] Nor does the fact that the financial statements of Thomson S.A. and Thomson Consumer are consolidated tend to establish the existence of an alter-ego relationship between the two entities. *See Ferrigno* v. *Philips Elec. N. Am. Corp.*, No. C-09-03085, 2010 WL 2219975, at *3-4 (N.D. Cal. June 1, 2010) (refusing to pierce the corporate veil for jurisdictional purposes where parent promoted itself and the subsidiary as a single entity on its website, in its financial statements, and in press-releases

Moreover, Sharp cannot satisfy the second prong of the alter-ego analysis, which requires Sharp to show that fraud or injustice would result if this Court does *not* find that Thomson S.A. is the alter-ego of Thomson Consumer. This requirement of bad faith is essential to the alter-ego doctrine, and courts apply the doctrine as an extreme remedy "only in narrowly defined situations when the ends of justice so require." *NuCal Foods, Inc.* v. *Quality Egg LLC*, 887 F. Supp. 2d 977, 992 (E.D. Cal. 2012) (citation omitted); *see also Wehlage* v. *EmpRes Healthcare, Inc.*, 791 F. Supp. 2d 774, 782 (N.D. Cal. 2011) (holding that, even where plaintiff alleges facts sufficient to demonstrate a unity of interest, the alter-ego theory will not apply unless plaintiff also alleges facts to suggest that an inequitable result would occur in the absence of veil-piercing). Sharp has not alleged the prospect of any such inequitable result. For example, Sharp has provided no evidence that Thomson Consumer, who is also named as a defendant in this matter, is a sham corporation, is undercapitalized, is non-operational or has been stripped of its assets by Thomson S.A. in an effort to evade any eventual judgment against it. *See NuCal Foods*, 887 F. Supp. 2d at 993-94. To the contrary, in the absence of a finding of personal jurisdiction over Thomson S.A., Sharp can continue to pursue its claims and could enforce any judgment against Thomson Consumer.

2. Thomson Consumer is Not the Agent Of Thomson S.A.

Sharp also cannot establish the existence of an agency relationship between Thomson Consumer and Thomson S.A. for purposes of establishing personal jurisdiction over Thomson S.A. To do so, Sharp must demonstrate (1) that Thomson Consumer represents Thomson S.A. "by performing services sufficiently important to [Thomson S.A.] that if it did not have a representative to perform them, [Thomson S.A.] . . . would undertake to perform substantially similar services," *Harris Rutsky*, 328 F.3d at 1135 (quotation omitted), and (2) that Thomson S.A. has the necessary degree of control over Thomson Consumer as its agent. *See Bauman*, 644 F.3d at 923 (finding sufficient control where written agreement gave parent the right to control "nearly every aspect of [subsidiary's] operations"); *see also Monje* v. *Spin Master, Inc.*, No. CV-09-1713, 2013 WL 2390625, at *9 (D. Ariz. May 30, 2013) (applying a two-prong test under the theory of agency, noting that "[c]ontrol is a core component of agency

law"); *Brady* v. *Grendene USA, Inc.*, No. 12cv0604, 2012 WL 2930081, at *4 (S.D. Cal. July 17, 2012) (same). Sharp cannot satisfy either requirement.

Sharp cannot satisfy the first prong of the test for at least two reasons. *First*, Thomson S.A. functions as a holding company. (*See* Cadieux Decl. ¶ 5.) As the Ninth Circuit has recognized, a holding company's subsidiaries conduct business as investments and not as agents. *Unocal*, 248 F.3d at 929 (citing *Gallagher* v. *Mazda Motor of Am., Inc.*, 781 F. Supp. 1079, 1085 (E.D. Pa. 1992)); *see also Ferrigno*, 2010 WL 2219975, at *4 (holding that Philips Electronics North America is not an agent of its Dutch parent company because, "[i]n the case of a holding company, the subsidiary does not perform any functions that the parent would otherwise have to perform; in the absence of this subsidiary, the parent could simply hold another type of subsidiary"). *Second*, Sharp has not demonstrated that Thomson Consumer's business is of special importance to Thomson S.A. or that it is sufficiently important that Thomson S.A. would carry on that business itself if Thomson Consumer did not do so on its behalf. *Sol Focht* v. *Sol Melia S.A.*, No. C-10-0906, 2012 WL 162564, at *12 (N.D. Cal. Jan. 19, 2012) (declining to find agency where plaintiff did not make out prima facie case that parent "would step in or have another representative step in to perform [subsidiary's] functions in [its] absence"). The fact that Thomson Consumer closed its U.S.-based CRT plants in 2004 and sold its CRT business to Videocon Industries, Ltd. in 2005 (Compl. ¶ 73) indicates exactly the opposite—that Thomson Consumer's CRT business was not sufficiently important to Thomson S.A. that it would carry on that business itself in Thomson Consumer's absence. *See In re W. States Wholesale Natural Gas. Antitrust Litig.*, 605 F. Supp. 2d 1118, 1136 (D. Nev. 2009) (holding that the defendant's decision to cease the trading activities in question suggests that those activities were not sufficiently important under the agency test).

And, for the reasons explained above, *supra* at 13-14, Sharp has also failed to allege that Thomson S.A. has a sufficient degree of control over Thomson Consumer to establish an agency relationship between the two entities. *Bauman*, 644 F.3d at 920-21 (holding that the agency test "requires the plaintiffs to show an element of control" and finding agency where the parent had the right to control "nearly every aspect of [the subsidiary's] operations"). "The

nature of the control exercised by the parent over the subsidiary necessary to put the subsidiary in an agency relationship with the parent must be over and above that to be expected as an incident of the parent's ownership of the subsidiary and must reflect the parent's purposeful disregard of the subsidiary's independent corporate existence." *E. & J. Gallo Winery* v. *EnCana Energy Servs., Inc*., No. CV F 03-5412, 2008 WL 2220396, at *15 (E.D. Cal. May 27, 2008) (quotation omitted); *see also Unocal*, 248 F.3d at 926 ("An . . . agency relationship is typified by parental control of the subsidiary's internal affairs or daily operations." (citing *Kramer Motors*, 628 F.2d at 1177)). Sharp has simply not pleaded any specific facts to rebut the general presumption in favor of respecting corporate separateness, and its boilerplate allegation regarding Thomson S.A.'s control over Thomson Consumer has been completely refuted by the Cadieux Declaration. Far from showing "purposeful disregard" of Thomson Consumer's independent corporate existence, the facts demonstrate that Thomson S.A. and Thomson Consumer were discrete and independent entities in both form and fact.

CONCLUSION

For the foregoing reasons, Sharp has failed to allege facts sufficient to establish this Court's personal jurisdiction over Thomson S.A., and its Complaint should be dismissed with prejudice.

Dated: July 3, 2013

Respectfully submitted,

/s/ Robert A. Sacks

Robert A. Sacks (SBN 150146)
Rory P. Culver (SBN 271868)
SULLIVAN & CROMWELL LLP
1888 Century Park East, Suite 2100
Los Angeles, California 90067
Tel.: (310) 712-6600
Fax: (310) 712-8800

Laura Kabler Oswell (SBN 241281)
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Tel.: (650) 461-5600
Fax: (650) 461-5700

Attorneys for Specially Appearing Defendant Thomson S.A